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No. 06-400

IN THE

Supreme Court of the United States

ELLIS C. SMITH,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERAN AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit properly deferred to the Department of Veterans Affairs' own interpretation of an ambiguous regulation instead of determining under 38 U.S.C. § 7292(d)(1) whether an alternative interpretation of that regulation "that was relied upon in the decision of the Court of Appeals for Veterans Claims" was "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law"?

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STATEMENT OF INTEREST[1]

The Veterans of Foreign Wars of the United States (VFW) is a federally chartered voluntary membership corporation with a total membership of nearly 1.9 million veterans, most of whom are also members of local Posts, which are themselves membership corporations or unincorporated associations. The VFW was founded in 1899. One of its fundamental purposes, as expressed in its Congressional Charter, 36 U.S.C. § 230102, is "to assist worthy comrades; to perpetuate the memory and history of our dead; and to assist their widows and orphans." Fulfilling that promise and purpose, the VFW and its members are actively engaged in protecting the rights of America's veterans and assuring that they receive the care and recompense they deserve for their service to the Country in defense of our freedoms.

As part of its mission, the VFW helps veterans and their families apply for disability compensation, rehabilitation and education programs, pension and death benefits, employment and training programs, and many other programs before the Department of Veterans Affairs ("VA"). VFW service officers function as attorneys-in-fact for the veterans and families they represent. The service officers guide veterans and their families through the rating boards and appeals process and, when needed, assist in presentations before the VA and the Board of Veterans' Appeals ("BVA").

The VFW is actively assisting veterans who, like the Petitioner here, suffer from tinnitus in both ears and whose benefits claims for a dual-disability rating will be affected by the outcome of Petitioner's case. The VFW estimates that it is assisting in approximately 2,700 such tinnitus cases that

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[1] Counsel for both parties have consented to the filing of this brief, and the parties' letters of consent have been filed with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the members of *amicus curiae* and its counsel, contributed monetarily to the preparation or submission of this brief.

have reached the BVA and another 4,000 cases under consideration in VA field offices. The VA held those cases in abeyance, pending the decision in Petitioner's case by the Court of Appeals for the Federal Circuit ("Federal Circuit"). Following the adverse ruling by the Federal Circuit, the VA activated the cases and began denying the dual-disability ratings claims. The VFW has assisted nearly 800 such veterans in appealing to the United States Court of Appeals for Veterans Claims ("Veterans Court"), where the cases are being stayed, pending the outcome of the petition for writ of *certiorari* in this case.

In reversing the Veterans Court's decision in favor of Petitioner, the Federal Circuit failed to review the Veterans Court's decision under the deferential arbitrary and capricious type review standard required by statute and intended by Congress. Instead, the Federal Circuit improperly reviewed the case *de novo* and wrongly deferred to the VA's regulatory interpretation. In doing so, the Federal Circuit mistakenly followed precedent by this Court that does not apply here in view of the statutory review standard enacted by Congress in 38 U.S.C. § 7292(d)(1). Correcting that error in this case will beneficially affect the thousands of veterans who are receiving the VFW's assistance with their tinnitus-related benefits claims before the VA. It will also clarify the roles of the Veterans Court and the Federal Circuit in their review of appeals from VA benefits decisions, better enabling the VFW in its mission to advise and assist veterans and their families with their VA benefits claims.

STATEMENT OF THE CASE

The VFW adopts the Statement of the Case presented by Petitioner. Pet. at 2-5. Petitioner is a veteran of honorable service who seeks a dual disability rating for service-related tinnitus suffered in each ear.

In reversing the Veterans Court's regulatory interpretations in favor of petitioner's dual disability claim, the Federal Circuit concluded that under 38 U.S.C. § 7292, it may "review interpretation of regulations by the Veterans

Court *de novo* and may set aside any regulation or interpretation of the regulation that we find to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observation of a procedure required by law." (Petitioner's Appendix A5a-A6a).

As a result of its *de novo* review, the Federal Circuit ruled that "[b]ecause the regulations here leave in doubt whether tinnitus in each ear can be a separate disability, they are ambiguous, and the [VA] was entitled to apply its own construction to the ambiguous regulations." (A12a). Nowhere, however, did the Federal Circuit find that the Veterans Court's alternative regulatory interpretation favoring petitioner was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law to justify setting aside the regulatory interpretation "that was relied upon in the decision of the Veterans Court," as required by 38 U.S.C. § 7292.

REASONS FOR GRANTING THE PETITION

I. Guidance Is Needed on the Proper Standard of Federal Circuit Review

This case presents a legal dispute that is classically appropriate for resolution by this Court under the considerations identified in Sup. Ct. R. 10. First, various panels of the Federal Circuit have stated conflicting standards for reviewing interpretations of VA regulations. Second, the question presented is purely legal in nature and controlled by statutory provisions that govern the Federal Circuit's jurisdiction over VA benefits cases and the Federal Circuit's scope of review. Third, the Federal Circuit's stated *de novo* review standard of the Veterans Court's regulatory interpretations and deference to a conflicting VA interpretation substantially departs from the limited scope of review intended by Congress and the scope of review permitted by statute. Finally, the resolution of this dispute will personally impact thousands of veterans who will be

denied benefits as a result of the Federal Circuit's erroneous decision.

A. The Federal Circuit is Limited to an Arbitrary and Capricious Type Standard of Review

The Federal Circuit's jurisdiction over appeals from the Veterans Court is provided in 38 U.S.C. § 7292. Section 7292(a) provides, in relevant part:

> After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule law or of any statute or regulation ... or *any interpretation thereof ... that was relied on by the Court* in making the decision.

(Emphasis added.)

The scope of the Federal Circuit's review of the Veterans Court's decisions is governed by 38 U.S.C. § 7292(d)(1), which provides in relevant part:

> The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or *any interpretation thereof ... that was relied upon in the decision* of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of the statutory right; or
>
> (D) without observance of procedure required by law.

(Emphasis added.)

Thus, 38 U.S.C. § 7292 expressly delineates the specific findings that the Federal Circuit must make before it may

permissibly set aside *any* regulatory interpretation *relied upon in the decision* of the Veterans Court. Consequently, the Federal Circuit may not set aside the Veterans Court's regulatory interpretation unless it finds that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; etc. 38 U.S.C. § 7292(d)(1). This is true even if the regulatory interpretation relied on in the Veterans Court's decision conflicts with the VA's own interpretation of the same regulation. Thus when presented with conflicting interpretations, the Federal Circuit is not permitted to preferentially defer to the VA's interpretation, even if it is a reasonable one. It can only give effect to the VA's interpretation if it finds that the Veterans Court's alternative interpretation is arbitrary, capricious, an abuse of discretion, or otherwise in conflict with law.

B. The Federal Circuit Disregarded the Statutorily Prescribed Review Standard

Here, the Federal Circuit improperly set aside the Veterans Court's interpretation without making any of the prerequisite findings under 38 U.S.C. § 7292(d)(1). Instead, the Federal Circuit mechanically deferred to the VA's own regulatory interpretation after concluding that the regulation was "ambiguous" and that the VA's interpretation was not "plainly erroneous." (*See* A12a-A13a.) In doing so, the Federal Circuit said that it was following this Court's previous rulings "that an agency's interpretation of its own regulations is entitled to substantial deference by the courts." (A10a (citing *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Auer v. Robbins*, 519 U.S. 452 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991); *Udall v. Tallman*, 380 U.S. 1 (1965)).)

Those prior decisions cited by the Federal Circuit, however, are distinguishable and do not control the issues presented here. First, resolution of those cases did not depend upon the construction of 38 U.S.C. § 7292, or similar statute, that precisely defines the scope of judicial review.

Second, the prior decisions addressed judicial review of regulatory interpretations of non-VA agencies that did not involve conflicting interpretations of a specialty Court, such as the Veterans Court. Finally, as discussed further below, Congress created a unique structure for the appeal and review of VA benefits claims that intentionally and substantially limits the scope of the Federal Circuit's review of the Veterans Court's decisions.

Although not controlling, this Court's ruling in *Martin* bears the closest resemblance to this case and is instructive. At issue was whether courts should defer to the Secretary of Labor when both the Secretary of Labor and the Occupational Safety and Health Review Commission ("the Commission") each propose reasonable but conflicting regulatory interpretations. *Martin*, 499 U.S. at 146. Similar to the divided roles between the VA and the Veterans Court, the Occupational Safety and Health Act assigned distinct regulatory responsibilities to the Secretary and the Commission, a three-member board appointed by the President. To the Secretary was assigned responsibility "for setting and enforcing workplace health and safety standards" and to the Commission was assigned an adjudicatory role to review the Secretary's citations and proposed penalties. *Id.* at 147-48. Further framing the issue presented, the Court sought to determine "to which administrative actor -- the Secretary or the Commission -- did Congress delegate ... 'interpretive' lawmaking power[.]" *Id.* at 151. Because the relevant statutes did "not expressly address the issue," the Court had to draw inferences from the structure and history of the statutes to determine which administrative actor had been delegated "the power to render authoritative interpretations[.]" *Id.* at 152.

The Court presumed that Congress "intended to invest interpretive power in the administrative actor in the best position to develop" expertise in the regulatory field and concluded that the Secretary was in a better position than the Commission to develop historical familiarity and policymaking expertise relevant to a particular regulatory interpretation. *Id.* at 153-54. Moreover, the Court reasoned

that "the more plausible inference is that Congress intended to delegate to the Commission the type of non-policymaking adjudicatory powers typically exercised by a *court*" whereby "the Commission is authorized to review the Secretary's interpretations only for consistency with regulatory language and for reasonableness." *Id.* at 154-55 (emphasis in original).

The Court's *Martin* decision is, however, expressly limited to its facts. *Id.* at 157-58. The Court said, "Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure." *Id.* at 158. Thus, although *Martin* may suggest a presumption that an adjudicatory body, such as the Veterans Court, does not exercise interpretive lawmaking power, it nevertheless acknowledges that "Congress is free, of course," to delegate those powers "as it chooses." *Id.*

C. Congress Empowered the Veterans Court to Make Authoritative Regulatory Interpretations

The statutory structure presented here demonstrates that Congress made such a delegation of authority to the Veterans Court, giving it a limited role in making authoritative interpretations of VA regulations. The Veterans Court's authority is provided in 38 U.S.C. § 7261, which provides, in relevant part:

> (a) In any action brought under this chapter [38 U.S.C. §§ 7251 et seq.], the [Veterans Court], *to the extent necessary to its decision* and when presented, shall
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> (1) decide all relevant questions of law, *interpret* constitutional, statutory, and *regulatory provisions*, and determine the meaning or applicability of the terms of an action of the Secretary;
>
> ....
>
> (3) hold unlawful and set aside decisions, findings..., conclusions, rules, and *regulations* issued

> or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of the statutory right; or
>
> (D) without observance of procedure required by law.

(Emphasis added.)

Under 38 U.S.C. § 7261(a)(1), the Veterans Court has authority to "interpret ... regulatory provisions." That interpretive authority may be exercised "to the extent necessary to" the Veterans Court's decision.

Comparing 38 U.S.C. § 7292, governing the Federal Circuit's scope of review, with 38 U.S.C. § 7261, governing the Veterans Court's scope of review, further underscores Congress's intention to give the Veterans Court interpretive authority. Section 7261(a)(3) requires the Veterans Court to use a deferential standard when reviewing the validity of VA *regulations*, setting VA regulations aside only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; etc.[2] Conspicuously absent from the review standard in 38 U.S.C. § 7261(a)(3) is any mention of the Veterans Court's review of the VA's *regulatory interpretations*.

In contrast, 38 U.S.C. § 7292(d)(1), which was enacted at the same time as 38 U.S.C. § 7261, expressly requires the

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[2] This deferential standard for reviewing the validity of VA *regulations* comports with this Court's ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, that a reviewing court must defer to an agency's statutory constructions embodied in promulgated regulations, unless the regulations "are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 843-44 (1984).

Federal Circuit to apply the same deferential standard when reviewing a *regulation* or "*any interpretation thereof*" by the Veterans Court. Not only were 38 U.S.C. §§ 7261 and 7292 enacted as part of the same legislation, they also bear close structural resemblance to each other, insofar as describing the scope of each court's review. However, the "any interpretation thereof" clause was not included in 38 U.S.C. § 7261. Congress obviously could have used that or similar language to expressly require the Veterans Court to review the VA's regulatory interpretations under the deferential arbitrary and capricious standard, but it did not.

As a result, there is no express statutory requirement that the Veterans Court defer to the VA's interpretations to resolve regulatory ambiguity. Moreover, inferring such a deferential standard of review is not appropriate. The express language of 38 U.S.C. § 7292(d)(1) confirms that Congress intended to authorize the Veterans Court to make authoritative interpretations of VA regulations that cannot be disturbed by the Federal Circuit, unless the Veterans Court's interpretations are arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, etc. Requiring the Veterans Court to defer to the VA's interpretations of ambiguous regulations would impermissibly prevent the Veterans Court from exercising that interpretive authority given by Congress.

Section 7292 therefore makes clear that the Veterans Court need not reflexively defer to the VA. Instead, the Veterans Court may rely upon *any* regulatory interpretation in its decisions that is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law—even if that interpretation is inconsistent with a reasonable VA regulatory interpretation. This does not mean that the VA's regulatory interpretations are accorded no deference. It means only that the VA's regulatory interpretations are not controlling. Where agency interpretations are not controlling, this Court has held that they, nevertheless, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). In practice,

therefore, the Federal Circuit's determination of whether the Veterans Court's regulatory interpretations are arbitrary, capricious, or an abuse of discretion may be guided, but not controlled, by the VA's own regulatory interpretations. *Accord General Electric Co. v. Gilbert*, 429 U.S. 125, 141-46 (1976) (EEOC guideline not controlling and evaluated against backdrop of earlier conflicting agency pronouncements). However, interpretive conflicts between the Veterans Court and the VA are not automatically resolved in the VA's favor. Section 7292 expressly requires the Federal Circuit to accord the Veterans Court's reasonable regulatory interpretations substantial deference.

This review standard is not necessarily at odds with the rationale of this Court's prior rulings that an agency's reasonable regulatory interpretations are given controlling weight because the agencies are presumably better equipped than courts to make sound policy judgments. *See, e.g., Martin*, 499 U.S. at 153-54. Here, Congress has not left the interpretation of VA regulations to inexperienced courts. To the contrary, Congress created a specialty court in 1988, the Veterans Court, that would develop expertise in the regulatory field through the adjudication of benefits claims. Therefore, when the Veterans Court relies in its decision upon a regulatory interpretation that is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, the Federal Circuit must defer to that interpretation, even if it conflicts with VA General Counsel opinions, manual provisions, or other interpretive statements.

II. Granting the Petition is Needed to Effectuate the Scope of Judicial Review Intended by Congress

A. Congress Intended to Significantly Limit the Scope of Federal Circuit Review

Prior to the Veterans' Judicial Review Act of 1988 ("the Act"), judicial review of VA benefits decisions was, with few exceptions, prohibited by "no-review" statutes, dating back to as early as 1933. *See generally Johnson v. Robison*, 415 U.S. 361, 368-69 (1974). The no-review statutes had two purposes: (1) to avoid burdening the courts with

veterans' benefits claims and the VA with litigation expense and (2) to insure uniformity in the application of VA policy to benefits claims. *Id.* at 370. There was great reluctance to "involve the courts in day-to-day determination and interpretation of Veterans' Administration policy." *Id.* at 372. There was also the practical concern that due to the courts' heavy criminal and other priority caseloads, judicial review would inevitably delay processing veterans' benefits claims. H.R. Rep. 100-963, 1988 U.S.C.C.A.N. 5782, 5830. The House Committee on Veterans' Affairs reported finding "from the testimony before the committee that judges do not wish to take on the very technical and specialized task of applying a well established body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants." *Id.* at 5806.

To achieve the objectives of efficiency and uniformity, Congress created the Veterans Court, with exclusive jurisdiction over appeals from VA benefits determinations. Moreover, Congress gave the Federal Circuit, rather than the regional courts of appeals, exclusive jurisdiction over appeals from the Veterans Court. *See id.* at 5810. Yet, the Federal Circuit's role in reviewing the Veterans Court's decisions was, from the beginning, intended to be a limited one.

Senator Alan Cranston memorialized the compromise between the Senate and the House of Representatives that led to the approval of the Act. The compromise related, in significant part, to the intended scope of the Federal Circuit's review of veterans' benefits claims. According to Senator Cranston:

> [U]nder this compromise, there is one more level of review. The validity of laws and regulations can be challenged in the [Federal Circuit].... If a veteran believes that a law or regulation is invalid on its face and if that law or regulation was germane to his claim, then the veteran can ask the Federal Circuit to rule on the validity of that law or regulation.

> The Federal Circuit cannot, ... review any factual questions in the veteran's appeal. The Federal Circuit cannot review whether, ... a law or regulation was applied inappropriately. *The key to the compromise,-* and *I cannot overemphasize this point-* is the limited nature of the Federal Circuit's jurisdiction.
> The compromise *does not envision the Federal Circuit as having general oversight of the [Veterans Court].* The compromise permits the Federal Circuit to review questions involving the validity of statutes and regulations as if it were reviewing them under a challenge to rulemaking. And that's it, ... that's it.

134 CONG. REC. S16632-01 (Oct. 18, 1988) (statement by Sen. Cranston) (emphasis added).

Thus, Congress intended that the Federal Circuit would play a very limited role in reviewing veterans' benefits claims. The deferential arbitrary and capricious standard of review provided in 38 U.S.C. § 7292(d)(1) reflects that limited review function intended by Congress. It does not burden the Federal Circuit with "general oversight" of the Veterans Court or require it to undertake a *de novo* review of the Veterans Court's regulatory interpretations, as the Federal Circuit did in this case. Rather, Congress rejects *de novo* review by the Federal Circuit in favor of the more limited arbitrary and capricious type review prescribed by 38 U.S.C. § 7292(d)(1).

B. Congress Intended the Veterans Court to Make Independent Regulatory Interpretations

The legislative history demonstrates that Congress intended to give the Veterans Court significant independence from the VA in interpreting regulations. For example, the House Committee on Veterans' Affairs reported that "[t]he creation of a court is intended to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States." H.R. Rep. 100-963, 1988 U.S.C.C.A.N. 5782, 5808.

The committee also expressed its views on the level of deference that the Veterans Court would be required to give the VA, stating, "As is presently the case in matters appealed to the [BVA], the Court *would not be required to give any deference* to the decision of the Administrator, and may substitute its judgment for the judgment of the VA decision-maker." *Id.* at 5788 (emphasis added).

The VA itself anticipated that Congress would create a governmental body with power to review and potentially invalidate its regulations. Although opposed to judicial review of its benefits decisions, the VA recommended that if such a review body was created, it should not be part of the VA's organization. The VA's General Counsel, Donald Ivers, testified before the House Committee,

> The VA is strongly opposed to legislative proposals that would authorize the [BVA], or any other element of the Agency, to invalidate its regulations and other precedential interpretations of the law. It is essential that the agency employ a coherent and consistent interpretation of the law. In the event the Board is permitted to second-guess or disregard the regulations and their interpretation, the law applied to claims may vary depending upon the stage of adjudication; i.e., rating boards may apply different standards than the [BVA].... In any case, reformulation of section 211(a), as noted earlier, would ensure veterans a day in court to challenge VA regulations, and thus provide for an independent review without the divisiveness or chaos that would be engendered by empowering one element of the Agency to abrogate VA regulations and other governing interpretations of law.

Id. at 5832-33.

Congress did create such an independent review body, the Veterans Court, outside of the VA organization. During Congress's deliberations, Senator Alan Cranston explained the anticipated division of labor between the VA and the Veterans Court with respect to fact-finding and the interpretation of statutes and regulations:

> The idea, Mr. President, is that the VA and [BVA] are recognized as the premier factfinders. Indeed, this is absolutely consistent with every other judicial review bill which has been considered in either body. With respect to factual determinations, then, the purpose of the Court of Veterans Appeals is to provide a last 'check' on [the BVA] to ensure that a particular veterans' case, for whatever reason, isn't getting short shrift. *On the other hand*, we expect a court to entertain and *decide full-blown challenges to the validity of the laws and regulations*. That, too, has been a feature of every other judicial review bill. And that's exactly the authority the compromise amendment would grant to the Court of Veterans Appeals.

134 CONG. REC. S16632-01 (Oct. 18, 1988) (statement by Sen. Cranston) (emphasis added).

Accordingly, the legislative history shows that Congress intended the Veterans Court to play a limited fact-finding role. In contrast, however, Congress fully intended to empower the Veterans Court to "decide full-blown challenges to the validity of the laws and regulations," including making authoritative regulatory interpretations. The legislative history likewise shows that Congress intended that the Veterans Court would exercise that authority independent of the VA and that the Veterans Court may give VA regulatory interpretations minimal deference in reaching its independent decisions.

III. Granting the Petition Is Needed to Resolve Conflicts Among Federal Circuit Panels

A. The Conflict Among Federal Circuit Panels

One of the considerations governing review on *certiorari* under Sup. Ct. R. 10 is whether one United States court of appeals has entered a decision that conflicts with a decision of another United States court of appeals. That specific conflict cannot arise in the context of appeals from the Veterans Court, because the Federal Circuit has exclusive jurisdiction over all such appeals. *See* 38 U.S.C. § 7292(c).

Nevertheless, that *type* of conflict has arisen over time among various panels of the Federal Circuit, which have not consistently construed the review standard of 38 U.S.C. § 7292.

Shortly after the Veterans Court was created, one panel of the Federal Circuit addressed the language that now appears in 38 U.S.C. § 7292(d)(1) (then codified as 38 U.S.C. § 4092(d)(1)):

> According to the first sentence of § 4092(d)(1), this Court may review the Veterans Court's legal determinations under a *de novo* standard. The second sentence of § 4092(d)(1) authorizes this court to set aside any regulations or regulatory interpretations of the Veterans Court which are unconstitutional, violative of statute, procedurally defective, or otherwise arbitrary.

Prenzler v. Derwinski, 928 F.2d 392, 393 (Fed. Cir. 1991); *accord Santana-Venegas v. Principi*, 314 F.3d 1293, 1296 (Fed. Cir. 2002) (Veterans Court's regulatory interpretations subject to arbitrary and capricious type review); *Herndon v. Pincipi*, 311 F.3d 1121, 1124 (Fed. Cir. 2002) (same); *Smith v. Pincipi*, 281 F.3d 1384, 1386 (Fed. Cir. 2002) (same).

In direct conflict with *Prenzler* and the plain language of 38 U.S.C. § 7292(d)(1), the Federal Circuit has elsewhere stated that the Veterans Court's regulatory interpretations are entitled to *no* deference. For example, in *Bingham v. Nicholson*, the Federal Circuit said, "[W]e may review the validity of 'a rule of law or of any statute or regulation ... or any interpretation thereof ... that was relied on by the [Veterans] Court in making the decision.' ... Such legal determinations of the Veterans Court are reviewed without deference." 421 F.3d 1346, 1348 (Fed. Cir. 2005) (citing *Prenzler*, 928 F.2d at 393); *accord Jensen v. Brown*, 19 F.3d 1413, 1415 (Fed. Cir. 1994) ("[I]nterpretation of a statute or regulation is a question of law which we review *de novo*") (citing *Prenzler*, 928 F.2d at 393); *Nolen v. Gober*, 222 F.3d 1356, 1359 (Fed. Cir. 2000) ("We review independently the Court of Appeals for Veterans Claims' interpretations of statutory provisions and regulations.").

The Federal Circuit has, therefore, stated conflicting standards for its review of regulatory interpretations by the Veterans Court. Those conflicting standards are materially different and will lead to substantively different outcomes in veterans benefits appeals to the Federal Circuit, unless the conflicts are resolved.

B. This Court Has Granted Certiorari to Resolve Similar Conflicts

The issues presented in the petition are similar and of equal importance to issues previously addressed by this Court in other contexts. For example, *certiorari* was granted to resolve conflicts among the Courts of Appeal as to whether denials of benefits under the Employee Retirement Income Security Act ("ERISA") by plan administrators should be reviewed under a *de novo* or arbitrary and capricious standard of review. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989). At issue in that case was the level of deference that should be given to interpretations by ERISA plan administrators. *Id.* at 108-114. The petition here presents similar motivations for this Court to state the proper standard of appellate review. *Accord Dickinson v. Zurko*, 527 U.S. 150 (1999) (the Court granted *certiorari* to consider whether the Federal Circuit reviews U.S. Patent & Trademark Office decisions under an "arbitrary and capricious" review standard or a "substantial evidence" review standard).

Likewise, the Court granted *certiorari* in *Martin v. Occupational Safety and Health Review Commission*, to resolve conflicts between the Secretary of Labor and the Occupational Safety and Health Review Commission as to which agency actor could exercise authoritative interpretive power in construing agency regulations. 499 U.S. 144 (1991). The Court noted in that decision that "[t]his is not the first time that we have been called upon to resolve an OSH Act 'jurisdictional' dispute between the Secretary and the Commission." *Id.* at 152 (citing *Cuyahoga Valley R. Co. v. United Transportation Union*, 474 U.S. 3 (1985)). The petition here presents similar jurisdictional issues—whether

the VA's regulatory interpretations are entitled to judicial deference over alternative interpretations by the Veterans Court that are not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

IV. The Federal Circuit Improperly Disregarded the Veterans Court's Regulatory Interpretation

Although the Federal Circuit expressed its disagreement with the Veterans Court's interpretation of the VA regulation, it failed to make the prerequisite findings under 38 U.S.C. § 7292(d)(1) to justify setting aside that interpretation in favor of the VA's interpretation. The Federal Circuit's failure to review the Veterans Court's regulatory interpretation under the prescribed statutory standard was not harmless, because applying the correct standard of review would lead to a different outcome.

A. The Veterans Court's Regulatory Interpretation Was Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

The principal fault that the Federal Circuit found with the Veterans Court's analysis was the alleged *presumption* "that tinnitus in one ear constitutes one disability, and that tinnitus in two ears constitutes two disabilities." (A12a.) However, the Veterans Court did not merely presume that bilateral tinnitus constitutes two disabilities. It arrived at the conclusion after extensively analyzing the VA's regulatory scheme as a whole and drawing rational conclusions from that analysis.

For example, the Veterans Court found that for similar conditions, the impairment of auricles, the VA's rating schedule for "Diseases of the Ear" expressly provided a higher rating for the loss of two auricles than for a loss of only one. (A42a-A43a.) In the context of disorders of the ears, the VA had treated bilateral defects as "two disabilities." Thus, the Veterans Court's analysis did not hang on a mere presumption that bilateral defects of the ear are separate disabilities, as suggested by the Federal Circuit, but was grounded in the VA's own regulatory practice.

Furthermore, the Veterans Court acknowledged that the VA's rating schedule was silent as to whether an enhanced rating is applied for tinnitus in both ears. (A41a.) In view of that silence, the VA asserted that "the drafters of the schedule meant to preclude a dual rating for the other ear diseases in that section, including tinnitus." (A42a.) The Veterans Court disagreed and returned to the example of the treatment of disabled auricles under the ratings schedule. The Veterans Court found that the enhancement provided for the loss of two auricles was, in actuality, a limitation on the dual disability rating that would otherwise apply to such a bilateral disability. (A43a.) Indeed, the rating enhancement provided by the schedule for the loss of two auricles was less than if both disabled auricles were rated separately. (*Id.*)

The Veterans Court thus reached precisely the opposite conclusion of what was proposed by the VA—a dual rating for bilateral disabilities is applied, unless the rating schedule otherwise expressly limits the applicable rating. (*Id.* (citing 38 C.F.R. § 4.25(b).) As a further example, the Veterans Court found that the rating schedule for retinal atrophy expressly limited bilateral disabilities to only one disability rating. (A43a-A44a.) The Veterans Court explained that without such an express limitation, other regulatory provisions, such as 38 C.F.R. § 4.25(b), would require a full dual rating. (A44a-45a.) Accordingly, because the rating table for tinnitus did not have such a limitation, the Veterans Court found that Petitioner's bilateral tinnitus disabilities should be given a full dual rating. (A46a.)

The Federal Circuit failed to even mention these findings by the Veterans Court. Instead of basing its interpretation that "tinnitus in two ears constitutes two disabilities" on a mere presumption, the Veterans Court engaged in a reasonable analysis of the VA regulatory structure that rationally supported its interpretation. Consequently, the Veterans Court's decision that "tinnitus in two ears constitutes two disabilities" was not arbitrary, capricious, an abuse of discretion, or contrary to law. That decision was fully consistent with a rational interpretation of the VA's regulations and should not have been overturned.

B. The Veterans Court Properly Construed the VA Regulations in Favor of Veterans

The rationality of the Veterans Court's decision is further supported by the application of "the rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994). The Veterans Court concluded that if 38 C.F.R. § 4.25(b) is subject to any reasonable interpretative doubt, "such doubt is to be resolved in favor of the veteran." (A46a (citing *Brown v. Gardner*, 513 U.S. at 117-118; *Allen (William) v. Brown*, 7 Vet. App. 439, 446-48 (1995) (en banc); *Otero-Castro v. Principi*, 16 Vet. App. 375, 380 (2002)). Thus, the Veterans Court not only complied with *Brown*, but also with 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.303(a) in that it observed the requirement of interpreting veterans' entitlement law under a "broad and liberal interpretation."

The Federal Circuit itself concluded that "the regulations here leave in doubt whether tinnitus in each ear can be a separate disability, they are ambiguous...." (A12a.) Against that backdrop, the Veterans Court's reasonable alternative interpretation of those same regulations, resolving the ambiguities in Petitioner's favor was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. To the contrary, the Veterans Court's decision complied with this Court's precedent in *Brown*.

C. Thousands of Veterans Have Been Denied Benefits Under the Federal Circuit's Ruling

Tinnitus is a disabling disease with no known cure. *Tinnitus Quick Facts*, American Tinnitus Association. According to the American Tinnitus Association ("ATA"), tinnitus "is a condition that interferes with concentration, sleep, and job performance, and ruthlessly reduces quality of life for those who suffer severely with it." (*Id.*)

According to the ATA 339,573 veterans were awarded disability compensation for tinnitus as of fiscal year 2005, representing a 20% increase over the prior year. American Tinnitus Association, http://www.ata.org/home/vetpage.html. The ATA identifies tinnitus as the number-one reason for

veterans' claims for disability benefits. (*Id.*) Although tinnitus affects large numbers in the general population, veterans are especially susceptible to the disease as a result of their service-related activities. (*Id.*)

Accordingly, the outcome of Petitioner's case will have a significant human impact on not only the more than 6,500 veterans assisted by the VFW but also on many others who have timely claims pending for bilateral tinnitus disability benefits. Unless corrected, the Federal Circuit's erroneous decision will deny those veterans the relief for which they were entitled under the VA's own regulations.

CONCLUSION

For the foregoing reasons, the VFW respectfully requests that the Court grant the petition for *certiorari* and reverse the decision of the court below.

Respectfully submitted,

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